IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

J U D G M E N T

Smt. Shanti Bai v. Udai Raj

S.B.CIVIL REGULAR FIRST APPEAL NO.243/2002 under Section 96 CPC against the judgment and decree dated 28.8.2002 passed by Additional District Judge, Bali in original suit No.6/1996, Udai Raj v. Smt. Shanti Bai, decreeing the same by passing the decree for specific performance of the contract.

Date of Judgment : 14th January, 2005

P R E S E N T

HON'BLE MR.JUSTICE GOVIND MATHUR

Mr. K.C.Samdaria, for the appellant.
Mr. N.M.Lodha, for the respondent.

BY THE COURT :

The instant appeal under Section 96 CPC is preferred by appellant defendant assailing validity and propriety of judgment and decree dated 28.8.2002 passed by Additional District Judge, Bali decreeing the suit by passing the decree for specific performance of the contract.

The facts in brief are that plaintiff respondent Shri Udai Raj preferred a suit for specific performance of the agreement said to be entered between the parties for sale of a piece of land in village Nadole, District Pali. The plaintiff stated in the plaint that the defendant is having a piece of land in village Nadole, District Pali and she wanted to sale the same. The plaintiff entered into an agreement with defendant with regard to sale of aforesaid plot at the consideration of Rs.66,000/-. The parties entered into the agreement

in this regard on 1.11.1995 at Mumbai, as both the parties normally resides at Mumbai. The plaintiff paid a sum of Rs.56,000/- through cheque No.174418, Bhuleshwar Branch, Union Bank of India, against settled consideration of Rs.66,000/-. Reference of this payment was given in the agreement arrived between the parties. It was also agreed between the parties that remaining amount of Rs.10,000/- shall be paid to the plaintiff at the time of registry and she, in her turn, hand over all original documents of the property in question and also take necessary steps to get the sale deed registered in favour of the plaintiff. According to the plaintiff the defendant was ignoring the performance of the agreement and, therefore, he served a notice dated 4.1.1996 through his counsel and the same was replied by the defendant through her counsel in which she denied the existence of agreement to sale. The plaintiff in these circumstances preferred the civil suit seeking a decree for specific performance. The trial court on basis of the pleadings framed five issues as under:-

> " 1- क्या प्रतिवादी ने दिनांक 1.11.95 को वादग्रस्त मकान रूपये 66,000.00 में वादी को बेचान करने का इकरार किया तथा बेचान प्रतिफल के प्रति रूपये 56,000.00 बतौर एडवान्स जरिये युनियन बैंक ऑफ इंडिया भुलेश्वर मुम्बई शाखा के चैक सं.174418 द्वारा प्राप्त किये तथा उसी दिन प्रतिवादी ने वादी के पक्ष में इकरारनामा निष्पादित किया ? वादी ।
>
> 2- क्या वादी बेचान प्रतिफल की शेष राशि रूपये दस हजार प्रतिवादी को अदा करने को तथा अपने जिम्मे की सभी शर्तो को स्वीकार करते हुए वादग्रस्त मकान माफिक इकरारनामा के खरीदने को तैयार व तत्पर रहा है तथा अभी भी तैयार है ? वादी ।
>
> 3- क्या वादग्रस्त इकरारनामा अनुपयुक्त स्टाम्प पर निष्पादित किया हुआ होने से तथा अन रजिस्टर्ड होने से साक्ष्य में ग्राहय नहीं है ? प्रतिवादी ।
>
> 4- क्या प्रतिवादी विशेष हर्जाना के रूप में रूपये पांच हजार प्राप्त करने का अधिकारी है ? प्रतिवादी ।
>
> 5- अनुतोष ?"

In support of the suit three persons viz.Udai Raj (PW-1), Balchand (PW-2) and S.Srivastava (PW-3) deposed before the trial court. The plaintiff also placed on record seven documents marked as Ex.1 to Ex.7 to substantiate the claim. The appellant defendant did not produce any evidence in defence.

The trial court decided issues No.1 to 4 in favour of the plaintiff. Accordingly the issue No.5 was also decided in favour of the plaintiff by decreeing the suit to the effect that the defendant was directed to execute the agreement dated 1.11.1995. Hence this appeal is preferred by the defendant.

I have heard counsel for the appellant defendant as well as counsel for the respondent plaintiff.

The first contention of the counsel for the appellant defendant is that the trial court erred while rejecting the application moved by the defendant under Order 26 Rule 4 CPC dated 23.7.2001 whereby a prayer was made to record the statements of the defendant by issue a commission as the defendant was residing beyond the local limits of the jurisdiction of the trial court. Counsel for the appellant defendant submits that the trial court should have allowed an opportunity to the defendant to adduce evidence in defence. He has placed reliance upon the judgment of Hon'ble Apex Court in case of Parmanand v. Bajrang & Anr., reported in JT 2001 (8) SC 8, wherein in peculiar facts and circumstances of the case Hon'ble Supreme Court

remanded the matter back to the trial court with a direction to the trial court to afford opportunity to defendant to adduce evidence in the suit and to decide the matter afresh.

I have gone through the judgment referred above and found that the same is having no application in the present case. In the aforesaid matter the first appellate court found that there might be some pressure upon the defendant to execute the sale agreement only as a security for recovery of loan. In the said case the contention of the appellant was that the trial court had committed serious illegality in declining the prayer for adjournment made by the defendant to adduce evidence and depriving him of an opportunity in that behalf. Per contra, in the present case number of opportunities were given to the defendant to adduce evidence as it is apparent from perusal of the order dated 13.5.2002 passed by the learned trial court rejecting the application preferred by the defendant under Order 26 Rule 4 CPC which reads as under:-

> "13.5.2002 -
>
> The counsel for both the parties are present. Heard the argument of both the learned counsels on application moved under O.26 R.4 of CPC dated 23.7.2001.
>
> The application is not supported by any affidavit nor there is any medical certificate corroborating disability of the defendant. The defendant is a necessary party and is not merely a witness. The learned counsel for the defendant has argued that the defendant is living at third floor in Bombay and there is no elevator provided in the building and the defendant regularly visits outside to listen religious sermons.
>
> Earlier several dates were given and

> fixed for the evidence of the defendant but she failed to come to produce herself for the evidence.
>
> Since there is no affidavit or medical certificate indicating illness and immobility of the defendants and for the reasons as disclosed by the plaintiff's counsel I find no force in the application moved by the defendant under O.26 R.4 of CPC hence same is rejected. The matter is fixed for the evidence of the defendant for 5.7.2002."

From reading of the order dated 13.5.2002 it is apparent that the application was rejected by the trial court on the count:-

(1) Several opportunities were given to the defendant to produce evidence but she failed to do so.

(2) No affidavit or medical certificate indicating illness and immobility of the defendants was filed along with the application.

From the record, I found that from 6.11.2000 the defendant sought at least three opportunities to produce evidence in defence. The defendant appellant failed to avail the opportunities allowed by the court. In view of it in my considered opinion no error was committed by the trial court while rejecting the application under Order 26 Rule 4 CPC by order dated 13.5.2002. It is also worthwhile to note here that after rejection of the application dated 23.7.2001 also the defendant did not choose to produce evidence in defence though further opportunities were given on 5.7.2002 and 29.7.2002. In view of whatever stated above, I do not find any merit in the contention of the counsel for the defendant appellant that the application

under Order 26 Rule 4 CPC was rejected erroneously or without proper application of mind.

The second contention of the counsel for the appellant defendant is that the court below erred while issuing a decree for specific performance without taking into consideration the provisions of Section 20 of the Specific Relief Act, 1963 (hereinafter referred to as "the Act of 1963"). According to the counsel for the defendant appellant the trial court passed the decree for specific performance as if it was obligatory to do so, whereas, it is a discretion of the court which is required to be exercised reasonably guided by the judicial principles. I have considered the provisions of Section 20 of the Act of 1963 which reads as under:-

> "20.Discretion as to decreeing specific performance.--(1) The jurisdiction to decree specific performance is discretionary, and the court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal.
>
> (2) The following are cases in which the court may properly exercise discretion not to decree specific performance.--
>
> (a) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or
>
> (b) where the performance of the contract would involve some hardship on the defendant which he did not forsee, whereas its non performance would involve no such hardship on the plaintiff;
>
> (c) where the defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance.

> Explanation I.-- Mere inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not be deemed to constitute an unfair advantage within the meaning of clause (a) or hardship within the meaning of clause (b).
>
> Explanation II.-- The question whether the performance of a contract would involve hardship on the defendant within the meaning of clause (b) shall, except in cases where the hardship has resulted from any act of the plaintiff, subsequent to the contract, be determined with reference to the circumstances existing at the time of the contract.
>
> (3) The court may properly exercise discretion to decree specific performace in any case where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.
>
> (4) The court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the other party."

It is true that by virtue of Section 20 of the Act of 1963 the jurisdiction to decree specific performance is discretionary and the court is not bound to grant such relief merely because it is lawful to do so but the discretion of the court is required to be exercised with sound reasons, reasonably and guided by the judicial principles. sub-section (2) of Section 20 of the Act of 1963 provides instances wherein the discretion vested with the court is required to be exercised. The counsel for the appellant defendant failed to satisfy existence of any of the circumstances prescribed under sub-section (2) of Section 20 of the Act of 1963 in the present case.

In the instant case the defendant appellant entered into an agreement with the plaintiff with open eyes. She also accepted a sum of

Rs.56,000/- against consideration for sale and thereafter she refused to perform the agreement, therefore, it can be very well said that the trial court exercised the jurisdiction vested with it with all sensibility and cautions.

The third contention of the counsel for the appellant defendant is that the court below erred while relying upon the statements of plaintiff Udai Raj and also on the statements of PW-2 Shri Balchand. According to the counsel for the appellant defendant, the plaintiff failed to prove in his statement that he gave any cheque of Rs.56,000/- to the defendant. On the contrary, plaintiff's own evidence i.e. Ex.4 and Ex.5 makes it apparent that the alleged cheque was issued by P.M.Shah & Company which has got no concern with the plaintiff.

It is further contended that the stamp of Rs.20/- was purchased on 27.10.1995 and the same does not bear name of purchaser nor the purpose for which the same was purchased. If Smt.Shanti Bai would have entered into any agreement as alleged then she would have purchased stamp for the purpose of agreement to sale.

These contentions of the counsel for the appellant defendant are of no consequence as no evidence was placed before the trial court by the appellant defendant. In fact there is no material available on record to substantiate the contention that the amount of Rs.56,000/- was in the account of appellant defendant for some other purpose than the requirement of the agreement dated 1.11.1995. The contention of the counsel for the appellant

defendant that stamp of Rs.20/- was purchased on 27.10.1995 and the same does not bear name of purchaser nor the purpose for which the same was purchased is also of no merit. The purchase of stamp on 27.10.1995 does not make the agreement illegal. Once the genuineness of the agreement entered between the parties has been accepted, the fact with regard to date of its purchase is not of any consequence. As such the third contention of the counsel for the appellant defendant also deserves to be rejected.

I have gone through the statements of the prosecution witnesses as well as the documents. There is no inconsistency in the statements given by the prosecution witnesses. There is no reason to disbelieve the statements given by Shri Udai Raj and Shri Balchand. Learned trial court, therefore, has not committed any error in appreciating the evidence available on record.

In view of whatever stated above, this appeal is having no force and, therefore, the same is hereby dismissed. The judgment and decree dated 28.8.2002 passed by the trial court in original suit No.6/1996 is hereby affirmed.

(GOVIND MATHUR),J.

kkm/ps.